

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

SHERWOOD BRANDS OF
RHODE ISLAND, INC.

v.

C.A. No. 00-287T

SMITH ENTERPRISES,
INC. and JAKE SMITH

MEMORANDUM AND ORDER AWARDING ATTORNEYS' FEES AND COSTS

TORRES, ERNEST C., Chief United States District Judge.

Sherwood Brands of Rhode Island, Inc. ("Sherwood") filed a seven-count complaint against Smith Enterprises, Inc. ("Smith Enterprises") and Jake Smith ("Smith") alleging that the defendants wrongfully copied gift sets of coffee mugs and hot cocoa packages, marketed by Sherwood, that were decorated with drawings of cows in various poses. Sherwood made claims for copyright infringement under the Copyright Act, 17 U.S.C. §§ 501, et seq. (Count I); trade dress infringement under the Lanham Act, 15 U.S.C. § 1125 (Count III); and for unfair competition (Count II), misappropriation of trade secrets (Count IV), dilution (Count V), tortious interference (Count VI) and breach of contract (Count VII) under state law.

All of the claims except the Copyright Act, Lanham Act, and

tortious interference claims against Smith Enterprises were dismissed.

The jury awarded Sherwood a total of \$391,537 on its copyright and trade dress infringement claims but returned a verdict for Smith Enterprises on the tortious interference claim.

Following the verdict, all parties moved for awards of attorneys' fees and costs. After hearing argument, this Court determined that Sherwood was entitled to attorneys' fees and costs in connection with its Lanham Act claim against Smith Enterprises and to costs in connection with its Copyright Act claim against Smith Enterprises. The Court also determined that Smith was entitled to attorneys' fees in connection with his defense of the Copyright Act and Lanham Act claims and to costs in connection with his defense of all of Sherwood's seven claims. Finally, the Court determined that Smith Enterprises was entitled to costs in connection with its defense of Sherwood's five state law claims. See December 21, 2001 Amended Order Regarding Attorneys' Fees and Costs.

The issue, now, before the Court is the amount of the fees and costs to be awarded.

Standard

Attorneys' fee awards, ordinarily, are calculated using the

lodestar method. Under this method, the Court must determine "the total number of hours reasonably spent" multiplied by "a reasonable hourly rate." Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984); see also Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Hours reasonably spent are determined by subtracting duplicative, unproductive, excessive, or unnecessary hours from the hours actually spent. Grendel's Den, 749 F.2d at 950. A reasonable hourly rate is determined by factoring the nature of the work performed, who performed it, the expertise required, and when the work was undertaken. Id.

Following the calculation of the lodestar, the Court may, in its discretion, allow for limited upward or downward adjustments. Id. at 951; Hensley, 461 U.S. at 434. Such adjustments may allow for " 'delay in payment, quality of representation (i.e., an unusually good or poor performance above or below the skill already reflected in the hourly rates), exceptional (and unexpected) results obtained, etc.' " Grendel's Den, 749 F.2d at 951 (quoting Furtado v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980)).¹

¹ The list of available adjustments to the lodestar, as written in Furtado and Grendel's Den, state that the lodestar amount may be adjusted to "reflect the contingent nature of any fee (if such is not reflected in the hourly rate)." However, citing City of Burlingame v. Dague, 505 U.S. 557 (1992), the First Circuit has since held that contingency is no longer an appropriate consideration for a lodestar

The Supreme Court has said that "[a] request for attorneys' fees should not result in a second major litigation." Hensley, 461 U.S. at 437. Consequently, the District Court is not required to engage in a line-by-line review of time records or to "drown in a rising tide of fee-generated minutiae." United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 15 (1st Cir. 1988). The District Court may calculate the lodestar amount based upon its own estimation of reasonable time necessary to perform tasks at issue, and a compensation rate for a competent lawyer in performing those tasks. Id.; see also Foley v. City of Lowell, 948 F.2d 10, 18-20 (1st Cir. 1991) (upholding fee award where district court summarily reduced requested fees by one-third because the hours claimed were "disproportionate both to the relative simplicity of the case and to the amount of damages recovered").

Discussion

I. Sherwood's Fees and Costs

A. Attorneys' Fees

The documentation submitted by Sherwood shows that attorneys Richard Zimmerman and Robert Fine billed Sherwood a total of \$32,591.25 for work relating to the Lanham Act claim only. Their bill reflects 143.97 hours of attorney time at \$225 per

adjustment. Lipsett v. Blanco, 975 F.2d 934, 943 (1st Cir. 1992).

hour and 2.47 hours of paralegal time at \$80 per hour. The amount claimed was reduced by \$3,707 to reflect duplication of work performed by Hinckley, Allen & Snyder, LLP, Sherwood's trial counsel, and it was increased by \$450, compensation for the time spent on preparing the fee affidavit. Therefore, the net amount claimed is \$29,334.25.

Records produced by Hinckley, Allen show that it billed Sherwood a total of \$161,063.91 based on 831.9 hours at rates ranging from \$125 to \$325 per hour. Hinckley, Allen also claims an additional \$4,604.50 for 22.35 hours spent preparing for and arguing the attorneys' fees motion. Adding that time results in a net amount claimed of \$165,668.41.

Thus, Sherwood seeks a grand total of \$195,002.66 in attorneys' fees.

1. Reasonable Hours Spent

The first step in the lodestar calculation is to determine whether the hours claimed by Sherwood were reasonable. Hours reasonably spent are determined by subtracting duplicative, unproductive, excessive, or unnecessary hours from the hours actually spent. Grendel's Den, 749 F.2d at 950.

Given that nature and complexity of the case, the 1,000.69 hours spent by counsel appears reasonable. Moreover, counsel have eliminated hours reflecting duplication of work by

Sherwood's two law firms. It is true that Hinckley, Allen made no attempt to separate the hours relating to Sherwood's Lanham Act claim against Smith Enterprises from the hours relating to its Lanham Act claim against Smith; but, since the two claims involved essentially the same facts and legal issues, it is doubtful that any less time would have been required to pursue the claim against Smith Enterprises alone. However, there are several other reasons why the number of allowable hours should be reduced.

First, Sherwood's counsel describe 777.7 of the hours billed as "common time" spent on the litigation, generally. It concedes that only 70% of this "common time" can fairly be attributed to the Lanham Act claim. Therefore, only 70% of the 777.7 hours of "common time," or 544.39 hours, will be allowed.

Second, since Sherwood has been only partially successful on the attorneys' fees issue, only half of the hours spent in preparing for and arguing the motion for attorneys' fees and costs (i.e., 12.18 hours) will be allowed.

Thus, the total time to be used in calculating the attorneys' fee to which Sherwood is entitled on its Lanham Act claim is 755.21 hours.

2. Reasonable Hourly Rate

Attorneys Zimmerman and Fine, partners at Chace, Ruttenberg

& Freedman, LLP, each charged Sherwood \$225 per hour. They also charged \$80 per hour for their paralegal help.

Five attorneys and two paralegals from Hinckley, Allen worked on the case. The two partners, William Grimm and Deborah Benson, each charged \$325 per hour. The two associates, Charles Blackman and Amy Spagnole, each charged \$170 per hour. Hinckley, Allen's contract attorney, V. Scott Foster, charged \$140 per hour, and the two paralegals, Maryelena Pollock and Hollie Capuano, each charged \$125 per hour. Those rates have not been challenged.

Multiplying the number of allowable hours by the respective hourly rates of counsel and their paralegals, yields a lodestar amount of \$147,537.61.²

3. Adjustments

Adjustments to the lodestar are warranted under limited circumstances, such as "delay in payment, quality of representation (i.e., an unusually good or poor performance above or below the skill already reflected in the hourly rates),

² This amount was calculated by taking Sherwood's claim for \$195,002.66 and adjusting it for the reduced "common time" and partial success in defending against the defendants' motion for attorneys' fees and costs discussed above. Specifically, attorney Grimm states that the 777.7 hours of common time was billed to Sherwood as \$150,542.66. The 30% reduction made by the Court changes this to \$105,379.86, a reduction of \$45,162.80. Moreover, attorney Grimm states that the 22.35 hours spent on preparing for and arguing the motions for attorneys fees and costs was billed to Sherwood as \$4,604.50. The 50% reduction made by the Court reduces that amount by \$2,302.25. Thus, the total amount of fees in question is reduced by \$47,465.05 to \$147,537.61.

exceptional (and unexpected) results obtained, etc.' " Grendel's Den, 749 F.2d at 951 (quoting Furtado v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980)).

In this case, no adjustments have been requested and the Court does not find that any are warranted.

B. Costs

Attorneys Zimmerman and Fine state that they incurred \$566 in costs relating to the Lanham Act claim.³ Attorney Grimm states that Hinckley, Allen incurred \$8,800.43 in costs related to the Copyright Act and Lanham Act claims.

These costs appear to be reasonable and are not disputed. Therefore, this Court finds that Sherwood is entitled to \$9,366.43 in costs on its Lanham Act and Copyright Act claims.

II. Jake Smith's Fees and Costs

A. Attorneys' Fees

1. Reasonable Hours Spent

The billing records submitted by Smith's counsel show that Smith and Smith Enterprises, together, were billed for a total of 1,245.5 hours, a figure that excludes travel time by North Carolina trial counsel and all hours expended by defendants'

³ Attorneys Zimmerman and Fine exclude from their calculation any costs associated with the Copyright Act claim. The Court is unclear why this was done, considering the Court granted costs for both the Copyright Act and Lanham Act claims. In any event, \$566 is all that these counsel have requested.

local counsel. Counsel estimates that approximately 80% of that time, or 994 hours, were spent in defense of the Copyright Act and Lanham Act claims and argues that that time should be divided equally between Smith and Smith Enterprises. Therefore, Smith seeks to recover for 497 hours.

Smith's estimate of the percentage of time spent on the Copyright Act and Lanham Act claims is perfectly consistent with, and perhaps even conservative when compared to, the percentage of time allocated by Sherwood's counsel to the Lanham Act claim alone. However, the portion of that time that Smith seeks to allocate to his defense should be reduced for several reasons.

First, as Sherwood points out, some of the hours listed reflect trial time spent after the claims against Smith, personally, were dismissed. Moreover, they include hours spent preparing for an unidentified state court appeal in November 2001.

Finally, because Smith was only partially successful in his motion for attorney's fees and costs, and because Smith included hours spent responding to Sherwood's motion for attorneys' fees which was directed only at Smith Enterprises, only half of the hours spent preparing for, arguing, and supplementing the motion for attorneys' fees and costs will be allowed.

Eliminating that time from the number of hours attributable to defense of the Copyright and Lanham Act claims and dividing the remainder equally between Smith and Smith Enterprises means that the attorneys' fee to be awarded to Smith should be based on 440.12 hours.⁴

2. Reasonable Hourly Rate

Smith's counsel state that they charged a blended rate of \$200.03 per hour that was calculated by utilizing the hourly rates charged by the attorneys and/or paralegals who worked on the case in accordance with the percentage of hours that each billed.⁵

The hourly rate charged by trial counsel, Alice Richey, was approximately \$280 per hour. The rates charged for the time of other partners ranged from \$220 to \$340 per hour; and the rates charged for the time of associates and/or paralegals ranged from

⁴ This amount was determined based on the Court's review of counsel's submitted time records, which showed approximately 41.5 trial hours (excluding travel) billed after all claims against Smith were dismissed; 27.7 hours spent on unidentified state court proceedings in November 2001; and 89.1 total hours spent on the motion for attorneys' fees, half of which the Court discounts. This reduces the total number of hours from 994 to 880.25, 50% of which Smith may claim, resulting in net hours of 440.12. The Court rejects Sherwood's argument that allocating the hours equally between Smith and Smith Enterprises is "objectively unreasonable" because, essentially, the same amount of work would have been required to defend either party, individually.

⁵ Counsel's initial affidavit states that the blended rate is \$200.30 per hour. However, a review of the calculation used by counsel reveals that this was a misprint and the true blended rate is \$200.03 per hour.

\$85 to \$150 per hour. These rates are comparable to, and indeed in most respects lower than, the rates allowed for Sherwood's counsel and paralegals. Moreover, they have not been challenged. Therefore, the Court accepts the blended rate of \$200.03.

Multiplying the number of allowable hours attributable to Smith by the rate of \$200.03 per hour produces a lodestar figure of \$88,037.20.

3. Adjustments

No upward or downward adjustment to the lodestar has been requested and the Court sees no basis for any adjustment.

B. Costs

Smith's counsel state that they incurred a total of \$8,307.34 in costs. That figure is not objected to and appears to be reasonable. Accordingly, Smith is entitled to one half of that amount, or \$4,153.67.

III. Smith Enterprises's Costs

Smith Enterprises was awarded costs incurred in connection with defending against Sherwood's five state law claims. In calculating the amount to which Smith Enterprises is entitled, \$634 of the \$8,307.34 in total costs must be excluded because it relates solely to the Copyright and Lanham Act claims. Moreover, since the copyright and trade dress claims represent

80% of the work done on the case, 80% of the remaining \$7,673.34 that cannot be attributed to any specific claim also should be eliminated. Therefore, the costs that Smith Enterprises is entitled to recover are 50% of the remaining \$1,534.67 or \$767.33.

Conclusion

For all of the foregoing reasons, the Court awards attorneys' fees and costs as follows:

1. Sherwood Brands is entitled to recover \$147,537.61 in attorneys' fees and \$9,366.43 in costs from Smith Enterprises; and
2. Smith is entitled to recover \$88,037.20 in attorneys' fees and \$4,153.67 in costs from Sherwood Brands; and
3. Smith Enterprises is entitled to recover \$767.33 in costs from Sherwood Brands.

By Order,

Deputy Clerk

ENTER:

Ernest C. Torres
Chief United States District Judge

Date: September , 2002